(1) Supreme Court, U.S.
FILED

No. 00 940 DEC - 5 2000

OFFICE OF THE CLERK

In The
Supreme Court of the United States

BARBARA N. WOODS,
Petitioner,

v.

U.S. POSTAL SERVICE, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

LARRY J. STEELE
Counsel of Record
P.O. BOX 561
WALNUT RIDGE, AR 72476
(870) 886-5840

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

44 pp

QUESTION PRESENTED

Whether equitable tolling is appropriate because of mental disability where procedural steps in pursuing a federal employee's claim through the administrative EEOC process set out in 29 C.F.R. §§ 1614.101-1614.110 requires that the federal employee must initiate contact with an EEO counselor within 45 days of the alleged discrimination. The same procedural scheme applies to claims of disability discrimination under the Rehabilitation Act of 1973.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner, Barbara N. Woods, was the plaintiff in the district court proceedings of this case and was the appellant before the Eighth Circuit Court of Appeals. Petitioner is an individual and has no corporate affiliations.

Respondents

Respondents, United States Postal Service and William Bill Henderson, in his official capacity as Postmaster General, were the defendants in the district court proceedings and appellees in the Eighth Circuit Court of Appeals.

There are no other parties to this action.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW ix

JURISDICTION ix

STATUTORY PROVISION INVOLVED ix

STATEMENT OF THE CASE 1

ARGUMENT FOR GRANTING WRIT

ARGUMENT 1

Certiorari should be granted because the lower courts' actions conflict with previous decisions of this Court in *Patsy v. Board of Regents of the State of Florida*, 102 S.Ct. 2557 (1982), holding that the exhaustion of administrative remedies is not a condition precedent to initiating an action under 42 U.S.C. § 1983 5

ARGUMENT 2

Certiorari should be granted because of a split of authority between the Circuits. Some courts have held that mental disability, even rising to the level of insanity, simply does not toll a federal statute of limitations. *Accardi v. United States*, 435 F.2d 1239, 1241 (3d. Cir. 1970); *Casias v. United States*, 532 F.2d 1339, 1342 (10th Cir. 1976). Other courts have indicated that mental incapacity might afford a basis for invoking the doctrine of equitable tolling, but those courts have required a significant level of incapacitation before allowing the plaintiff to invoke the doctrine. *See Lopez v. Citibank, NA.*, 808 F.2d 905 (1st Circuit 1987) (even though plaintiff suffered from mental illness, tolling was not allowed because plaintiff was represented by counsel); *Hood v. Sears, Roebuck & Co.*, 168 F.3d 231 (5th Cir. 1999) (court declined to toll the limitations because plaintiff was able to obtain counsel). 6

ARGUMENT 3

Certiorari should be granted because the issue of equitable tolling, because of a mental disability, is a question of first impression in the Eighth Circuit and the district court's rationale for its decision is not clear and is misplaced 9

CONCLUSION 10

APPENDIX

Appendix A
Eighth Circuit Judgment affirming the Judgment of the District Court, 6/22/00 (filed 9/18/00) 1a

Appendix B
Notice of Appeal (filed 5/1/00) 3a

Appendix C
District Order denying plaintiff's motion for appointment of counsel to represent her on appeal (filed 4/24/00) 7a

Appendix D
District Court Order relieving Garland Watlington as plaintiff's counsel (filed 3/20/00) . 8a

Appendix E
District Court Order denying plaintiff's Motion to Alter or Amend Judgment (filed 3/20/00) 10a

Appendix F
District Court Order and Judgment granting defendant's Motion to Dismiss (treated as a motion for summary judgment) (filed 7/9/99) . 16a

Appendix G
Eighth Circuit Order Denying Petition for Rehearing With a Suggestion for Rehearing En Banc (filed 9/7/00) 22a

Appendix H
Letter from Dr. Jim Pang, Jr. dated 5/7/99 . . . 23a

TABLE OF AUTHORITIES

Cases

Accardi v. United States,
435 F.2d 1239 (3d. Cir. 1970) . . .iv, 2, 3, 6, 7, 8, 9

Casias v. United States,
532 F.2d 1339 (10th Cir. 1976) . . . .iv, 2, 6, 7, 8, 9

Heideman v. PFL, Inc.,
904 F.2d 1262 (8th Cir. 1990) 2

Hood v. Sears, Roebuck & Co.,
168 F.3d 231 (5th Cir. 1999) . . . . . *.passim*

James v. U.S. Postal Service,
835 F.2d 1265 (8th Cir. 1988) 9

Lopez v. Citibank, NA.,
808 F.2d 905 (1st Circuit 1987) . . . . . *.passim*

Pacheco v. Rice,
966 F.2d 904 (5th Cir. 1992) 2

Patsy v. Board of Regents of the State of Florida,
102 S.Ct. 2557 (1982) . . . . . .iii, 5, 6, 10

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. ___ (2000) 9

Zotos v. Lindbergh Sch. Dist.,
121 F.3d 356 (8th Cir. 1997) 3, 10

Statutes:

28 U.S.C. § 1254(1) ix

28 U.S.C. § 2106 ix

29 C.F.R. §§ 1614.101-1614.110 . . . . . .i, ix

42 U.S.C. § 1983 . . . . . iii, 5, 6

Rules:

Federal Rules of Civil Procedure, Rule 56 . . . . . .1, 8

OPINIONS BELOW

The Order of the United States Court of Appeals for the Eighth Circuit denying Appellant's Petition for Rehearing With a Suggestion for Rehearing En Banc was filed September 7, 2000. A copy of the Order is included in Appendix G at 22a. The Judgment of the United States Court of Appeals for the Eighth Circuit affirming the Judgment of the United States District Court for the Eastern District of Arkansas was entered June 22, 2000 and filed September 18, 2000. A copy of the Judgment is included in Appendix A at 1a. The Order of the District Court denying plaintiff's Motion to Alter or Amend Judgment is included in Appendix B at 3a. The Order and Judgment of the District Court granting defendant's Motion to Dismiss which was treated as a motion for summary judgment is printed in Appendix C at 9a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its Judgment affirming the Judgment of the District Court on June 22, 2000. On August 2, 2000, Petitioner filed a Petition for Rehearing With a Suggestion for Rehearing En Banc which the Eighth Circuit denied on September 7, 2000 (App. G at 22a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing With a Suggestion for Rehearing En Banc. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

STATUTORY PROVISION INVOLVED

29 C.F.R. § 1614.105

STATEMENT OF THE CASE

In an Order filed March 20, 2000, denying Petitioner's Motion to Alter or Amend Judgment (App. E at 10), the district court succinctly summarized the facts and issues herein as follows:

> This is an employment discrimination lawsuit brought against the United States Postal Service (hereinafter "Postal Service") by a former employee alleging age and disability discrimination and wrongful termination. The Court treated defendant's motion to dismiss or strike as one for summary judgment and disposed of it under Federal Rules of Civil Procedure 56. The Court had only one issue to decide - whether plaintiff timely exhausted her administrative remedies prior to filing suit. The Court held that plaintiff was capable but was not diligent in pursuing all of her legal remedies. Therefore, the Court declined to allow tolling of the limitations period, granted the motion to dismiss/ summary judgment, entered judgment for defendants and dismissed plaintiff's complaint.
>
> In her response to defendants' motion to dismiss, plaintiff conceded that the initial contact with the EEO counselor did not occur within the forty-five (45) day time period required. However, plaintiff argued that, "[e]quitable tolling is appropriate, when despite all due diligence, a plaintiff is unable to discover essential information bearing on

the existence of his claim." *Pacheco v. Rice*, 966 F.2d 904, 906 (5th Cir. 1992). Plaintiff submitted that she was mentally unable to ascertain the nature of the deadlines.

Defendants argued that equitable tolling is appropriate "only when the circumstances that cause a plaintiff to miss a filing deadline are out of [her] hands." *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir. 1990).

This Court found that the issue whether mental incapacity will toll the period for contacting an EEO counselor appears to be a case of first impression for the federal courts in the Eighth Judicial Circuit. It was noted that some courts have held that mental disability, even rising to the level of insanity, simply does not toll a federal statute of limitations. *Accardi v. United States*, 435 F.2d 1239, 1241 (3d. Cir. 1970); *Casias v. United States*, 532 F.2d 1339, 1342 (10th Cir. 1976). Other courts have indicated that mental incapacity might afford a basis for invoking the doctrine of equitable tolling, but those courts have required a significant level of incapacitation before allowing the plaintiff to invoke the doctrine. *See Lopez v. Citibank, NA.*, 808 F.2d 905 (1st Circuit 1987) (even though plaintiff suffered from mental illness, tolling was not allowed because plaintiff was represented by counsel); *Hood v. Sears, Roebuck & Co.*, 168 F.3d 231 (5th Cir. 1999) (court declined to toll the limitations because plaintiff was able to obtain counsel).

This Court found that plaintiff had the sufficient mental capacity and was capable of initiating and participating in several legal processes during the time period for contacting an EEO counselor. It appeared, however, that plaintiff was not diligent in pursuing all of her available legal remedies and deadlines. The court noted that the Eighth Circuit had held that one who fails to act diligently cannot invoke equitable principles to excuse the lack of diligence. *Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 362 (8th Cir. 1997).

Plaintiff filed her motion to alter or amend stating that she could not tell under which line of cases the decision was made to deny her claim. She admits she would not prevail if the Court adopted the standard in *Accardi v. United States*, 435 F.2d 1239, 1241 (3d Cir. 1970) that mental disability, even rising to the level of insanity, simply does not toll a federal statute of limitations. However, plaintiff states that if the Court relied on the standard in *Lopez v. Citibank, NA*, 808 F.2d 905 (1st Cir. 1987), and *Hood v. Sears, Roebuck & Co.*, 168 F.3d 231 (5th Cir. 1999), that mental incapacity might afford a basis for invoking the doctrine of equitable tolling, that plaintiff presented sufficient evidence to invoke the doctrine.

Clearly, as plaintiff concedes, she cannot prevail under the standard in *Accardi*. The Court in *Lopez* and *Hood* both declined to

toll the limitations as the plaintiffs in those cases were represented by counsel.

In *Lopez*, the Court noted "there is no absolute rule that would require tolling whenever there is mental disability. The federal courts 'have taken a uniformly narrow view of equitable exceptions to Title VII limitations periods.'" *Lopez*, 808 F.2d at 906 (citations omitted). The Court also noted that a case-specific analysis was appropriate and suggested that "in federal courts the policy of repose weighs somewhat more heavily than in state courts against the various equitable factors that may, in an individual case, argue for an exemption." *Id.* at 907.

Evidence relied on by the Petitioner consisted of the following medical opinion of Jim Pang, Jr., M.D. which is included in Appendix H at 23a:

Jim Pang, Jr., M.D.
2911 Brunswick Road
Memphis, Tennessee 38133

May 7, 1999

To Whom It May Concern;

RE: Barbara Woods

Barbara Woods has been my patient since May 5, 1996. She is still seeing me on a regular basis. In my professional opinion, her attention span and memory has not been

normal since my first visit with her. She has in the past had memory lapses and is still having memory lapses. She certainly has not been able to handle business matters that require any concentration, or anything relating to doing anything on a timely basis. I feel that she has the initiative, and tries to handle whatever she needs to, but some of the time she just can't manage, due to her inability to concentrate and remember.

She is still on medication for sleep and for her nerves. My next appointment with Barbara Woods is on June 9, 1999, at my Southaven office.

Sincerely,
/s/ Jim Pang, Jr. M.D.

Petitioner now seeks the review of this Court.

ARGUMENT FOR GRANTING WRIT

ARGUMENT 1

Certiorari should be granted because the lower courts' actions conflict with previous decisions of this Court in *Patsy v. Board of Regents of the State of Florida*, 102 S.Ct. 2557 (1982), holding that the exhaustion of administrative remedies is not a condition precedent to initiating an action under 42 U.S.C. § 1983.

The district court framed the issue as "whether plaintiff timely exhausted her administrative remedies prior to filing suit". Specifically, the district court rationalized its decision, finding for Respondents that the Petitioner was capable but not diligent in pursing all of her legal remedies. The discussion of Petitioner's mental capacity in reaching its conclusion is relevant to the rationale of the district court and the implications thereof.

This Court in *Patsy v. Board of Regents of the State of Florida*, 102 S.Ct. 2557 (1982), held that the exhaustion of administrative remedies is not a condition precedent to initiating an action under § 1983. Respondents' motion for summary judgment should have been denied based on *Patsy*, *supra*, alone. Petitioner's potential claims under 42 U.S.C. § 1983 are similar in nature to her claims herein.

ARGUMENT 2

Certiorari should be granted because of a split of authority between the Circuits. Some courts have held that mental disability, even rising to the level of insanity, simply does not toll a federal statute of limitations. *Accardi v. United States*, 435 F.2d 1239, 1241 (3d. Cir. 1970); *Casias v. United States*, 532 F.2d 1339, 1342 (10th Cir. 1976). Other courts have indicated that mental incapacity might afford a basis for invoking the doctrine of equitable tolling, but those courts have required a significant level of incapacitation before allowing the plaintiff to invoke the doctrine. *See Lopez v. Citibank, NA.*, 808 F.2d 905 (1st Circuit

1987) (even though plaintiff suffered from mental illness, tolling was not allowed because plaintiff was represented by counsel); *Hood v. Sears, Roebuck & Co.*, 168 F.3d 231 (5th Cir. 1999) (court declined to toll the limitations because plaintiff was able to obtain counsel).

The district court correctly noted that "the issue whether mental incapacity will toll the period for contacting an EEO counselor appears to be a case of first impression for the federal courts in the Eighth Judicial Circuit". (App. F)

The district court also briefed the split of authority among the various district courts. Citing *Accardi*, *supra*, and *Casias*, *supra*, the district court noted the Third and Tenth Circuits' view that "mental disability, even rising to the level of insanity, simply does not toll a federal statute of limitations." (App. F).

Citing *Lopez*, *supra*, and *Hood*, *supra*, the district court noted the opposing view held by the First and Fifth Circuits which "indicated that mental incapacity might afford a basis for invoking the doctrine of equitable tolling, but those courts have required a significant level of incapacitation before allowing the plaintiff to invoke the doctrine." (App. F).

Because the district court couched its decision by discussing Petitioner's mental capacity, it must be inferred that the district court followed the First and Fifth Circuits, but determined that Petitioner's lack of mental capacity was not sufficient to allow her to invoke the doctrine of equitable tolling.

The district court "treated defendant's motion to dismiss or strike as one for summary judgment and disposed of it under Federal Rules of Civil Procedure 56." (App. F). The facts are undisputed. If the district court relied on the First and Fifth Circuits' position that "mental incapacity might afford a basis for invoking the doctrine of equitable tolling," then the issue is whether Petitioner's mental incapacity affords such basis. The facts herein are distinguished from cases cited by the First and Fifth Circuits in that Petitioner was not represented by counsel at the time of her failure to contact an EEO counselor during a forty-five (45) day period of limitations. The appellants in the First and Fifth Circuit cases were represented by an attorney at the time. Besides not being represented by an attorney, Petitioner herein has supplied sufficient evidence of her mental incapacity in the opinion of Dr. Pang. The district court rationalizes that because the Petitioner protected her interest in many other avenues, then she should have been more responsible and contacted an EEO counselor as well during the forty-five (45) day period. Is it not reasonable to assume that one with Petitioner's mental diagnosis could miss one requirement when she was taking care of so many others?

Some courts have held that mental disability, even rising to the level of insanity, simply does not toll a federal statute of limitations. *Accardi v. United States*, 435 F.2d 1239, 1241 (3d. Cir. 1970); *Casias v. United States*, 532 F.2d 1339, 1342 (10th Cir. 1976). Other courts have indicated that mental incapacity might afford a basis for invoking the doctrine of equitable tolling, but those courts have required a significant level of incapacitation before allowing the plaintiff to invoke the doctrine. *See Lopez v. Citibank, NA.*, 808 F.2d 905 (1st Circuit 1987) (even though plaintiff suffered from mental illness, tolling was not allowed because plaintiff was represented by counsel); *Hood v. Sears,*

Roebuck & Co., 168 F.3d 231 (5th Cir. 1999) (court declined to toll the limitations because plaintiff was able to obtain counsel).

ARGUMENT 3

Certiorari should be granted because the issue of equitable tolling, because of a mental disability, is a question of first impression in the Eighth Circuit and the district court's rationale for its decision is not clear and is misplaced.

The district court relied on *James v. U.S. Postal Service*, 835 F.2d 1265, 1267 (8th Cir. 1988), to shore up its opinion because James was unassisted by counsel, unable to find a lawyer, was unfamiliar with the legal process, and still was denied equitable tolling. But James did not have the mental incapacity as described by Dr. Pang's opinion of Petitioner.

The district court also addressed the issue of Petitioner's failure to hire an attorney, one reason given by the *Lopez* court for denying Lopez's request for tolling of the statute. From the pleadings, the conclusion is obvious. Petitioner herein was out of work and was not able to obtain an attorney until one was appointed by the district court.

The trend apparently is a more liberal interpretation and application of discrimination law and procedure as evidenced by the June 12, 2000 decision of the U.S. Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. ___ (2000). The court in *Reeves*, *supra*, clarified the burden on the parties concerning a motion for a judgment as

a matter of law (and presumably a motion for summary judgment).

Petitioner respectfully suggests that the district court's reliance on *Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 361 (8th Cir. 1997), is misplaced. At the least, the facts herein are distinguished from *Zotos*, *supra*. Zotos was a school teacher complaining of a transfer from teaching in the district's program for gifted and talented students. Apparently, Zotos also had the services of an attorney. At issue in *Zotos* was her missing a two-year statute of limitations under the ADEA. In the case at bar, Petitioner missed a forty-five (45) day statute of limitations for consulting with an EEO counselor. Petitioner also lacked legal representation and suffered from an apparent mental disability. Although the headnote in *Zotos* states, "One who fails to act diligently cannot invoke equitable principles to excuse lack of diligence," the court notes in its opinion, "However, we need not decide these issues or decide the question whether her transfer claim is subject to equitable tolling." *Id.* at 362.

CONCLUSION

The district court's decision in this case, affirmed by the Eighth Circuit Court of Appeals, is inconsistent with *Patsy v. Board of Regents of the State of Florida*, 102 S.Ct. 2557 (1982). Petitioner's mental disability, recognized by her treating physician, was ignored by the lower courts. Because of a split of authority in the Circuit courts of appeal concerning the issue of equitable tolling, the Petition for Writ of Certiorari should be granted. Otherwise, the purpose of the ADA is defeated because of Petitioner's disability.

Supreme Court guidance is necessary and critical to prevent this miscarriage of justice.

/s/_____
LARRY J. STEELE, ESQ.
Counsel of Record
P.O. Box 561
Walnut Ridge, AR 72476-0561
(870) 886-5840

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Filed September 18, 2000]
Dated: June 22, 2000

No. 0-2278EAJ

Barbara N. Woods,	)
Appellant,	)
	)
v.	)
	)
U.S. Postal Service, et al,	)
(See attached complete style)	)
Appellees.	)
	)

Appeal from the United States District Court
for the Eastern District of Arkansas

JUDGMENT

This court has reviewed the original file of the United States District Court. It is ordered by the court that the jurisdiction of this court is sustained and the judgment of the district court is affirmed. See Eighth Circuit Rule 47A(a).

(5361-010199)

A true copy.

ATTEST: /s/_____
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

MANDATE ISSUED
September 15, 2000

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

[Filed May 1, 2000]

No. 3:98CV330 SMR

Barbara N. Woods,	)
Plaintiff,	)
	)
vs.	)
	)
U.S. Postal Service, et al,	)
Defendants.	)
	)

Notice of Appeal

I, Barbara Woods (Plaintiff) wish to appeal the order and judgment dated 7/9/99.

The attorney previously appointed for me (Mr. Garland Watlington) ahs withdrawn from my case. I feel I have been left hanging in mid air - so I need help with this case. His notice to me, of his leaving, was after March 22, 2000.

Please see attachments.

On March 23rd I had a total knee replacement by Dr. Michael Lynch, Methodist Central- Memphis, TN. I was in the hsopital a week, and have been incapacitated since then for several weeks with therapy and so on -

WATLINGTON LAW FIRM
Garland L. Watlington - Attorney at Law
1009 S. Main Street
Jonesboro, Arkansas 72401

Telephone: (870) 972-6110
Fax: (870) 932-2939

May 1, 2000

Ms. Barbara Woods
432 South Dogwood Cove
Marion, AR 72364

Re: Barbara N. Woods v. U.S. Postal Service, et al.
U.S. District Court No. J-C-98-330

Dear Ms. Woods:

After careful review of your information, I regret that I will not be able to represent you in the above matter. Despite my best efforts, I do no believe that we will prevail in your case, therefore, I am returning your file to you on this date.

Accordingly, I encourage you to consult another attorney regarding this claim. This firm hereby releases any lien it has in connection with its representation of you in this matter. I wish you the best of luck in resolving this issue.

Sincerely yours,

WATLINGTON LAW FIRM

/s/_____
Garland L. Watlington

GLW:sb

/s/_____ 5-01-00
Barbara Woods Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

[Filed April 24, 2000]

No. 3:98CV330 SMR

Barbara N. Woods, *Plaintiff,*	)
vs.	)
U.S. Postal Service, et al, *Defendants.*	)

ORDER

Plaintiff's motion for appointment of counsel to represent her on appeal (Doc. No. 33) is denied. In the event that plaintiff perfects her appeal, the Eighth Circuit Court of Appeals will rule on a motion for appointment of counsel on appeal.

SO ORDERED this 20th day of April, 2000.

/s/_____
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

[Filed March 20, 2000]

No. 3:98CV330

Barbara N. Woods,	)
Plaintiff,	)
	)
vs.	)
	)
U.S. Postal Service, et al,	)
Defendants.	)
	)

ORDER

The motion to withdraw as counsel for plaintiff is granted and Attorney Garland L. Watlington is relieved as plaintiff's counsel in this case.

Plaintiff's motion for extension of time to file notice of appeal is also granted and plaintiff is allowed up to and including April 17, 2000 to file her notice of appeal.

Dated this 16th day of March, 2000.

/s/_____
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

[Filed March 20, 2000]

No. 3:98CV330

Barbara N. Woods,	)
Plaintiff,	)
	)
vs.	)
	)
U.S. Postal Service, et al,	)
Defendants.	)
	)

ORDER

Pending before the Court is plaintiff's motion to alter or amend judgment.

This is an employment discrimination lawsuit brought against the United States Postal Service (hereinafter "Postal Service") by a former employee alleging age and disability discrimination and wrongful termination. The Court treated defendant's motion to dismiss or strike as one for summary judgment and disposed of it under Federal Rules of Civil

Procedure 56. The Court had only one issue to decide - whether plaintiff timely exhausted her administrative remedies prior to filing suit. The Court held that - plaintiff was capable but was not diligent in pursuing all of her legal remedies. Therefore, the Court declined to allow tolling of the limitations period, granted the motion to dismiss/summary judgment, entered judgment for defendants and dismissed plaintiff's complaint.

In her response to defendants' motion to dismiss, plaintiff conceded that the initial contact with the EEO Counselor did not occur within the forty-five (45) day time period required. However, plaintiff argued that, "[e]quitable tolling is appropriate, when despite all due diligence, a plaintiff is unable to discover essential information bearing on the existence of his claim." Pacheco v. Rice, 966 F.2d 904, 906 (5th Cir. 1992). Plaintiff submitted that she was mentally unable to ascertain the nature of the deadlines.

Defendants argued that equitable tolling is appropriate "only when the circumstances that cause a plaintiff to miss a filing deadline are out of [her] hands." Heideman v. PFL, Inc., 904 F.2d 1262, 1266 (8th Cir. 1990).

This Court found that the issue whether mental incapacity will toll the period for contacting an EEO counselor appears to be a case of first impression for the federal courts in the Eighth Judicial Circuit. It was noted that some courts have held that mental disability, even rising to the level of insanity, simply does not toll a federal statute of limitations. Accardi v. United States, 435 F.2d 1239, 1241 (3d. Cir. 1970); Casias v. United States, 532 F.2d 1339, 1342 (10th Cir. 1976). Other courts have indicated that mental

incapacity might afford a basis for invoking the doctrine of equitable tolling, but those courts have required a significant level of incapacitation before allowing the plaintiff to invoke the doctrine. See Lopez v. Citibank, NA., 808 F.2d 905 (1st Cir. 1987) (even though plaintiff suffered from mental illness, tolling was not allowed because plaintiff was represented by counsel); Hood v. Sears, Roebuck & Co., 168 F.3d 231 (5th Cir. 1999) (court declined to toll the limitations because plaintiff was able to obtain counsel).

This Court found that plaintiff had the sufficient mental capacity and was capable of initiating and participating in several legal processes during the time period for contacting an EEO counselor. It appeared, however, that plaintiff was not diligent in pursuing all of her available legal remedies and deadlines. The court noted that the Eighth Circuit had held that one who fails to act diligently cannot invoke equitable principles to excuse the lack of diligence. Zotos v. Lindbergh Sch. Dist., 121 F.3d 356, 361 (8th Cir. 1997).

Plaintiff filed her motion to alter or amend stating that she could not tell under which line of cases the decision was made to deny her claim. She admits she would not prevail if the Court adopted the standard in Accardi v. United States, 435 F.2d 1239, 1241 (3d. Cir. 1970) that mental disability, even rising to the level of insanity, simply does not toll a federal statute of limitations. However, plaintiff states that if the Court relied on the standard in Lopez v. Citibank, NA, 808 F.2d 905 (1st Cir. 1999), and Hood v. Sears, Roebuck & Co., 168 F.3d 231 (5th Cir. 1999), that mental incapacity might afford a basis for invoking the doctrine of equitable

tolling, that plaintiff presented sufficient evidence to invoke the doctrine.

Clearly, as plaintiff concedes, she cannot prevail under the standard in Accardi v United States, 435 F.2d 1239, 1241 (3d. Cir. 1970). The Courts in Lopez and Hood both declined to toll the limitations as the plaintiffs in those cases were represented by counsel.

In Lopez, the Court noted "there is no absolute rule that would require tolling whenever there is mental disability. The federal courts 'have taken a uniformly narrow view of equitable exceptions to Title VII limitations periods.'" Lopez, 808 F.2d at 906 (citations omitted). The Court also noted that a case-specific analysis was appropriate and suggested that "in federal courts the policy of repose weighs somewhat more heavily than in state courts against the various equitable factors that may, in an individual case, argue for an exemption." Id., at 907.

In this case, during the 45 day period for contacting an EEO counselor, plaintiff initiated and filed a grievance over her removal and also completed and filed an application for disability' retirement. Plaintiff was not in the workplace when the grievance was filed or when she made her request for disability retirement but she managed to timely pursue these claims. In order to initiate the grievance process, the plaintiff or someone on her behalf had to contact the union, which she did. All that was required of plaintiff to initiate the EEO process was for plaintiff or someone on her behalf to contact an EEO counselor, which she failed to do. By simply contacting an EEO counselor in a timely manner, she could

have preserved her right to go forward at a later date if she was unable to participate fully in the process at the time.

Furthermore, plaintiff filed a pro se complaint on July 31, 1998. On that same date, plaintiff filed a motion to proceed in forma pauperis and a motion for appointment of counsel. The filing of these pleadings again shows that plaintiff was not incapable of handling her own affairs.

Viewing the facts in the light most favorable to the plaintiff, the Court finds that plaintiff's mental state did not prevent her from diligently pursuing various legal rights during the EEO filing period. Plaintiff has offered no strong evidence to explain why she was able to hire an attorney to pursue her other legal remedies yet unable to hire an attorney and/or to timely pursue her EEO claim.[1] She, therefore, cannot justify equitable tolling and her claim was correctly dismissed for failure to file a timely EEOC charge.[2]

---

[1] In James v. U.S. Postal Service, 835 F.2d 1265, 1267 (8th Cir. 1988), the Court declined to toll limitations where the only explanation offered for the noncompliance was that plaintiff was unassisted by counsel, unable to find a lawyer, and unfamiliar with the legal process.

[2] In James, the Court indicated that "[c]ircumstances that might justify equitable tolling include situations where 'a claimant has received inadequate notice, . . . a motion for appointment of counsel is pending(,) . . . the court has led the plaintiff to believe that she had done everything required of her, . . . [or] affirmative misconduct on the part of a defendant lulled the plaintiff into inaction." Id. at 1267, n.3.

It is, therefore, ORDERED that plaintiff's motion to alter or amend judgment is denied.

SO ORDERED this 16th day of March, 2000.

/s/_____
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

[Filed July 9, 1999]

No. J-C-98-330

Barbara N. Woods,	)
Plaintiff,	)
	)
vs.	)
	)
U.S. Postal Service, et al,	)
Defendants.	)
	)

ORDER

Pending before the Court is defendants' motion to dismiss, or, in the alternative to strike and plaintiff's motion for leave to file second amended complaint. The parties each submitted matters outside the pleadings which were considered by the Court. Therefore, defendants' motion to dismiss shall be treated as one for summary judgment and disposed of as provided by Rule 56 of the Federal Rules of Civil Procedure.

Plaintiff's motion for leave to file second amended complaint is granted without objection from defendants.

This is an employment discrimination lawsuit brought against the United States Postal Service (hereinafter "Postal Service") by a former employee alleging age and disability discrimination and wrongful termination. Defendants filed a motion to dismiss or strike noting several deficiencies in the original complaint. Plaintiff's second amended complaint corrected many of the deficiencies. However, one issue still remains - whether plaintiff timely exausted her administrative remedies prior to filing suit?

Under Federal Rule of Civil Procedure 56, Summary Judgment mandated where depositions, discovery responses and affidavits show that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970);

Inland Oil and Transport Co. v. United States, 600 F.2d 725, 727-28 (8th Cir.1979), cert. denied, 444 U.S. 991 (1979)

It is well settled law that administrative time limits are not jurisdiction prerequisites, but rather are conditions precedent filing suit and "like a statute of limitations, are subject to waiver, estoppel, and equitable tolling." Zipes v. Trans World Airlines, 455 U.S. 385, 393 (1982).

The procedural steps in pursuing a federal employee's claim through the administrative EEOC process are set out in 29 C.F.R §§1614.101-1614.110. Section 1614.105 provides that the federal employee must initiate contact with an EEO Counselor within 45 days of the alleged discriminatory action. The same procedural scheme applies to claims of disability discrimination under the Rehabilitation Act of 1973. Plaintiff concedes that the initial contact with the EEO Counselor did not occur within the forty-five (45) day time period required. However, plaintiff argues that, "[e]quitable tolling is appropriate, when despite all due diligence, a plaintiff is unable to discover essential information bearing on the existence of his claim." Pacheco v. Rice, 966 F.2d 904, 906 (5th Cir. 1992). Plaintiff submits that she was mentally unable to ascertain the nature of the deadlines. Defendants argue that equitable tolling is appropriate "only when the circumstances that cause a plaintiff to miss a filing deadline are out of [her] hands." Heideman v. PFL. Inc., 904 F.2d 1262, 1266 (8th Cir. 1990).

The issue whether mental incapacity will toll the period for contacting an EEO counselor appears to be a case of first impression for the federal courts in the Eighth Judicial Circuit. Some courts have held that mental disability, even

rising to the level of insanity, simply does not toll a federal statute of limitations. Accardi v. United States, 435 F.2d 1239, 1241 (3d. Cir. 1970); Casias v. United States, 532 F.2d 1339, 1342 (10th Cir. 1976). Other courts have indicated that mental incapacity might afford a basis for invoking the doctrine of equitable tolling, but those courts have required a significant level of incapacitation before allowing the plaintiff to invoke the doctrine. See Lopez v. Citibank, NA., 808 F.2d 905 (1st Cir. 1987) (even though plaintiff suffered from mental illness, tolling was not allowed because plaintiff was represented by counsel); Hood. v. Sears, Roebuck & Co., 168 F.3d 231 (5th Cir. 1999) (court declined to toll the limitations because plaintiff was able to obtain counsel).

In this case, it appears from the documents attached to defendants' brief in reply to plaintiff's response to motion to strike, that the plaintiff had the sufficient mental capacity to file a grievance and participate in the grievance process during the time period for contacting an EEO counselor. Also during that time frame, plaintiff completed and filed an application for disability retirement and hired an attorney and sought workers' compensation benefits and attended and testified at a hearing. It appears that plaintiff was competent to initiate and handle these matters but was not diligent in pursuing all of her available remedies and deadlines. The Eighth Circuit has held that one who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence. Zotos v. Lindberh Sch. Dist., 121 F.3d 356, 361 (8th Cir. 1997).

Plaintiff's attachments, including the one from her treating physician, Dr. Jim Pang, Jr., reveal that plaintiff is physically disabled as a result of an injury in 1979. Dr. Pang

cited her physical disability, along with the stress of physical pain, the mental pressure of not being able to perform her old job, and her financial stress as reasons plaintiff is unable to work again. While noting that plaintiff's memory is bad and that she has a hard time dealing with stress, Dr. Pang, does not conclude that plaintiff is suffering from a mental disability to such an extent as to prevent her from pursuing her rights and remedies.

The court finds there are no genuine issues of material fact remaining for trial and that defendants' are entitled to judgment as a matter of law.

It is, therefore, ORDERED that defendants' motion for summary judgment is granted and plaintiff's complaint is dismissed for failure to timely exhaust administrative remedies.

SO ORDERED this 7th day of July, 1999.

/s/_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

[Filed July 9, 1999]

No. J-C-98-330

Barbara N. Woods,	)
Plaintiff,	)
	)
vs.	)
	)
U.S. Postal Service, et al,	)
Defendants.	)
	)

JUDGMENT

Pursuant to the Order entered this date, Judgment is entered in favor of defendants and plaintiff's complaint is dismissed with prejudice.

SO ORDERED this 7th day of July, 1999.

/s/_____
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed September 7, 2000]

No. 0-2278EAJ

Barbara N. Woods,	)
Appellant,	)
	)
v.	)
	)
U.S. Postal Service, et al,	)
Appellees.	)
	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

September 7, 2000

Order Entered at the Direction of the Court:
/s/_____
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX H

Jim Pang, Jr., M.D.
2911 Brunswick Road
Memphis, Tennessee 38133
(901) 377-4719
Fax (901) 373-0920

May 7, 1999

To Whom It May Concern: RE: Barbara Woods

Barbara Woods has been my patient since May 5, 1996. She is still seeing me on a regular basis. In my professional opinion, her attention span and memory has not been normal since my first visit with her. She has in the past had memory lapses and is still having memory lapses. She certainly has not been able to handle business matters that requires any concentration, or anything relating to doing anything on a timely basis. I feel that she has the initiative, and tries to handle whatever she needs to, but some of the time she just can't manage, due to her inability to concentrate and remember.

She is still on medication for sleep and for her nerves. My next appointment with Barbara Woods is on June 9, 1999, at my Southaven office.

Sincerely,

/s/ _____
Jim Pang, Jr. M.D.